Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHEN MANUFACTURING CO., INC.,

Petitioner,

v.

THE RITZ HOTEL LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether The Federal Circuit and TTAB erred in applying the first DuPont factor by failing to consider the commercial impression and connotation of an Opposer's mark RITZ for similar and identical goods where the commercial impression of the mark of an Applicant, which is known as "The RITZ", was found to have a commercial impression based on fame derived from the same term.

Whether the TTAB and Federal Circuit erred by failing to consider the connotation and commercial impression of the Opposer's mark RITZ, while imparting a commercial impression for Applicant's RITZ mark based on Applicant's fame for Applicant's RITZ HOTEL services.

Whether the TTAB and Federal Circuit erred by attributing a connotation for Applicant's mark based on the term containing the Opposer's mark, and not according a similar connotation or commercial impression consistent with an English dictionary definition for the word RITZ used by Opposer for similar goods.

Whether the Federal Circuit erred by limiting its consideration of the strength of an Opposer's mark to whether the Opposer's mark was famous.

Whether the Federal Circuit erred in considering the fame of Applicant, whose name contains the Opposer's mark, without considering the reverse confusion likely to occur where Opposer is a prior user of the mark.

Whether the Federal Circuit erred in deviating from its own precedent when it narrowed an applicant's listed goods description by imposing limitations on the goods that did not appear in the goods description.

Whether, under APA Section 706(2)(E), judicial review of a Trademark Trial and Appeal Board ("TTAB") decision is possible when the TTAB opinion is indiscernible as to what evidence was properly of record.

Whether the Federal Circuit, in judicial review capacity under APA Section 706(2)(E), can make a factual conclusion as to the strength of a trademark when the TTAB failed to undertake such an analysis by not making the requisite factual findings or providing the pertinent rationale in light of the legal standard for strength.

Whether, under the APA Section 706(2)(E) substantial evidence standard of review, the Federal Circuit can reverse a finding of the TTAB simply because the Federal Circuit is able to draw an inconsistent conclusion from the facts as set out by the TTAB.

Under APA 706(2)(E), can the Federal Circuit make a factual finding as to the connotation of a trademark when the TTAB's opinion is silent as to the pertinent facts and the legal standard to be employed for such a determination.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Shen Manufacturing Company, Incorporated, ("Shen") is a Pennsylvania corporation. There are no parent corporations or publicly held companies that hold ten percent or more of the stock of Shen Manufacturing Company, Incorporated.

Respondent, The Ritz Hotel Limited, is a limited corporation under the laws of the United Kingdom.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES vii

TABLE OF APPENDICES xi

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

The Proceeding Below 3

STATEMENT OF THE FACTS 4

THE TRADEMARK TRIAL AND APPEAL BOARD'S DECISION 5

THE FEDERAL CIRCUIT'S DECISION 7

REASONS FOR GRANTING THE PETITION 11

I. THE FEDERAL CIRCUIT FAILED TO FOLLOW EXISTING PRECEDENTS OF THIS COURT, THE FEDERAL CIRCUIT,

Contents

Page

AND IS IN CONFLICT WITH THE SECOND CIRCUIT ON IMPORTANT ISSUES OF TRADEMARK LAW. 11

A. The Federal Circuit and TTAB erred in applying the first DuPont factor by failing to consider the commercial impression and connotation of an Opposer's mark RITZ for goods similar or identical to Applicant's goods, where the commercial impression of the mark of Applicant, which is known as " The RITZ", was found to have a commercial impression based on fame derived from the same term. 12

B. The TTAB and Federal Circuit erred by failing to consider the connotation and commercial impression of the Opposer's mark RITZ, while inparting a commercial impression for Applicant's RITZ marks based on Applicant's fame for Applicant's Ritz Hotel services. 15

C. The TTAB and Federal Circuit erred by attributing a connotation for the Applicant's mark based on the term containing the Opposer's mark, and not according the connotation or commercial impression for the word RITZ used by Opposer for similar goods consistent with an English dictionary definition. 16

Contents

Page

D. The Federal Circuit erred by limiting its consideration of the Strength of an Opposer's mark to whether the Opposer's mark was famous. 17

E. Failure to Consider Reverse Confusion in View of Applicant's Fame. 21

F. The Federal Circuit impermissibly narrowed Applicant's goods description in order to find no likelihood of confusion. 22

II. CERTIORARI SHOULD BE GRANTED BECAUSE TTAB ADJUDICATION AND THE REVIEW OF SUCH BY THE FEDERAL CIRCUIT ARE ESSENTIALLY STANDARD-LESS, IN VIOLATION OF THE ADMINIS-TRATIVE PROCEDURE ACT. 23

A. TTAB's Opaque Decision, Lacking Factfinding, Legal Standards, and Articulate Reasoning. 24

B. The Reviewing Court / Federal Circuit as the Factfinder. 25

C. Substantial Evidence Requires That The Board's Findings Be Given Substantial Deference by the Federal Circuit. 28

CONCLUSION 29

TABLE OF CITED AUTHORITIES

Page

Cases:

Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976) 21

Ameritech, Inc. v. Am. Info. Tech. Corp., 811 F.2d 960, 1 U.S.P.Q. 2d 1861 (6th Cir. 1987) 22

B&J Oil & Gas v. FERC, 353 F.3d 71 (D.C. Cir. 1994) 29

Bose Corp. v. QSC Audio Prods., Inc., 293 F.3d 1367 (Fed. Cir. 2002) 27

Boucher v. Apfel, No. 99-1906, 2000 U.S. App. LEXIS 29895 (6th Cir. 2000) 28

Checkpoint Systems, Inc. v. Check Point Software Tech., Inc., 269 F.3d 270, 60 U.S.P.Q. 2d 1609 (3d Cir. 2001) 22

Colgate Polmolive Co. v. Carter-Wallace, Inc., 432 F.2d 1400, 167 U.S.P.Q. 529 (C.C.P.A. 1970) 26

Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966) 29

Dickson v. Zurko, 527 U.S. 150, 50 U.S.P.Q.2d 1930 (1999) 24

Dreamwerks Production Group v. SKG Studio, 142 F.2d 1127, 46 U.S.P.Q 2d. 1561 (9th Cir. 1998) ... 22

Cited Authorities

Page

Hewlett-Packard v. Packard Press, Inc., 281 F.3d 1261 (Fed. Cir. 2002) 15

In Re Gartside, 203 F.3d 1305 (Fed. Cir. 2000) 29

In re Jolley, 308 F.3d 1317 (Fed. Cir. 2002) 28

In re Shell Oil Co., 992 F.2d 1204, 26 U.S.P.Q. 2d 1687 (Fed. Cir. 1993) 22

Kenner Parker Toys, Inc. v. Rose Art Industries, Inc., 963 F.2d 350 (Fed. Cir. 1992) 17

Octocom Systems, Inc. v. Houston Computer Services, Inc., 918 F.2d 937 (Fed. Cir. 1990) 23

Packard Press, Inc. v. Hewlett-Packard Co., 227 F.3d 1352, 56 U.S.P.Q.2d 1351 (Fed Cir. 2000) .....*passim*

Palm Bay Imports, Inc. v. Maison Fondee en 1772, 396 F.3d 1369 (Fed. Cir. 2005) 15

Phillips Petro v. C.J. Webb, 442 F.2d 1376, 170 U.S.P.Q. 35 (C.C.P.A. 1971) 13

Recot, Inc. v. M.C. Becton, 214 F.3d 1322 (Fed. Cir. 2000) 16

Two Pesos v. Taco Cabana, Inc., 505 U.S. 763, 120 L. Ed. 2d 615, 112 S. Ct. 2753, 23 U.S.P.Q.2d 1081 (1992) 20, 21, 27

Cited Authorities

	Page
Virgin Enters. v. Nawab, 335 F.3d 141 (2d Cir. 2003)	19
Vornado, Inc. v. Breuer Elec. Mfg. Co., 390 F.2d 724, 156 U.S.P.Q. 340 (C.C.P.A. 1968)	26
Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205 (U.S. 2000)	21
Statutes:	
5 U.S.C. § 706	ii, 2, 3, 25
15 U.S.C. § 1052	1, 2
15 U.S.C. § 1052(e)	21
15 U.S.C. § 1052(f)	21
15 U.S.C. § 1057(b)	2, 21
15 U.S.C § 1063	1
28 U.S.C. § 1254(1)	1

Cited Authorities

Page

Other Authorities:

37 C.F.R. § 2.51(e) 13

COMPACT OXFORD ENGLISH DICTIONARY (2004) 14

RANDOM HOUSE UNABRIDGED DICTIONARY (1997) 14

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) 14

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1969) 14

3 J.T. MCCARTHY, MCCARTHY ON TRADEMARKS AND Unfair Competition, § 23.22 26

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Federal Circuit Decided December 17, 2004 ..... 1a

Appendix B — Opinion Of The United States Patent And Trademark Office Dated August 7, 2003 ... 16a

Appendix C — Request For Oral Hearing Of The United States Patent And Trademark Office Dated October 2, 2002 ..... 24a

Appendix D — Order Of The United States Court Of Appeals For The Federal Circuit Denying Petition For Rehearing Dated March 8, 2005 ..... 34a

Appendix E — Relevant Statutes 36a

Appendix F — Summary Of Oppositions 43a

Appendix G — Shen's Ritz Marks 47a

Petitioner, Shen Manufacturing Company Incorporated ("Shen"), by and through its attorneys, respectfully petitions for a writ of *certiorari* to review the judgment of the Court of Appeals for the Federal Circuit ("the Federal Circuit").

OPINION BELOW

The opinion of the Federal Circuit is reported at 393 F.3d 1238 and reproduced in Petitioner's Appendix (hereinafter "App.") at 1a-15a. The order denying panel rehearing and denying rehearing *en banc* is reported at 2005 U.S. App. LEXIS 5032 and is reproduced in App. at 34a-35a.

STATEMENT OF JURISDICTION

Judgment of the Federal Circuit was entered on December 17, 2004, and the order denying panel rehearing and denying rehearing *en banc* issued on March 8, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 13 of the Lanham Act, 15 U.S.C § 1063 sets forth the grounds for opposing a trademark application before the United States Patent and Trademark Office. The controlling portion of section 13 provides that "[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register, . . . may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office. . . ." 15 U.S.C. § 1063 (2004). The entirety of section 13 is set forth in App. 41a-42a.

Section 2 of the Lanham Act, 15 U.S.C. § 1052, sets forth a basis for opposing a trademark application pending before the United States Patent and Trademark Office. The controlling portions are set forth below and section 2 in its entirety, is set forth in App. 37a-40a.

> No trademark in which the goods of the applicant may be distinguished from the goods of others shall be

> refused registration on the principal register on account of its nature unless it –
>
> . . .
>
> (d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive. . . .

15 U.S.C. § 1052 (2004).

Section 7(b) of the Lanham Act, 15 U.S.C. § 1057(b), provides a registration is *prima facie* evidence.

> A certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.

15 U.S.C. § 1057(b) (2004).

Section 5 of the Administrative Procedure Act, 5 U.S.C. § 706, circumscribes the Federal Circuits scope of review:

> 706. Scope of review
>
> to the extent necessary to decision and when presented, the reviewing court shall decide all the relevant questions of the law, interpret constitutional and statutory provisions, and determine the meaning

or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

. . .

(E) unsupported by substantial evidence in a case . . . review on the record of an agency hearing provided by statute. . . .

5 U.S.C. § 706 (2004). App. 36a-37a.

STATEMENT OF THE CASE

The Proceeding Below

In 1984 and 1985 Ritz Hotel Limited ("RHL" or "Applicant") filed seven trademark applications with the United States Patent and Trademark Office ("USPTO") seeking to register marks consisting of or containing the word RITZ for various goods and services. Shen Manufacturing Company, Incorporated ("Shen" or " Petitioner" or "Opposer") filed seven Notices of Opposition opposing the applications on the basis that RHL's use of its proposed marks in connection with its goods and services is likely to cause confusion with Shen's RITZ marks. A summary of Shen's RITZ marks is presented *infra* at App. Tables II and IIa. A summary of the seven oppositions is presented *infra* at App. Table I. By order of the Trademark Trial and Appeal Board ("TTAB" or "Board") dated April 25, 2001, the seven oppositions were consolidated. The Board deferred ruling on evidentiary objections on October 2, 2002. App. 24a-33a. On August 7, 2003, the Board sustained Opposition Nos. 72,818, 74,778, and 75,003, and the remaining Opposition Nos. 71,706, 72,817, 73,756, and 74,517 were dismissed. App. at 16a-23a.

Upon appeal, the Federal Circuit affirmed the decision dismissing Opposition Nos. 71,706, 73,756, and 74,517 and

reversed the decision sustaining Opposition Nos. 72,818 and 75,003. App. at 2a. The application of Opposition No. 72,817 was expressly abandoned by Applicant RHL, and the TTAB decision in Opposition No. 74,778 was not appealed by RHL. This being the case, no ruling was made on these Oppositions by the Federal Circuit. The Federal Circuit denied a petition for rehearing and rehearing *en banc* on March 8, 2005. App. 34a-35a.

STATEMENT OF THE FACTS

The appeal to the Federal Circuit from the TTAB involves five Oppositions, Nos. 71,706, 72,817, 73,756, 75,003 and 74,517 ("the Oppositions"). Table I provides a summary of the oppositions at issue. App. 43a-46a. Tables II and IIa provide a summary of the Opposer Shen's various RITZ marks asserted in these proceedings. App. 47a-48a. Table IIb of the Appendix to this petition contains a non-exhaustive list of goods sold by Shen in commerce under its common law RITZ marks. App. 49a.

It is undisputed that Shen is the senior user of RITZ in U.S. commerce — since 1892 with a line of household cleaning cloths that originally included dishtowels and cleaning cloths. App. 2a. As of the close of discovery, in 1999, it was established that Shen sold its products in every state of the nation and in many foreign countries and Shen's goods expanded from cloths to other household goods, such as, kitchen towels, aprons, napkins, oven mitts, kitchen gloves, chef's clothing and protective wear, bath towels, seat cushions and shower curtains. Shen's RITZ mark expanded into a RITZ PRO series, a RITZ STERLING series, RITZ SUPREME, RITZ DESIGN LINE, RITZ ESSENTIALS, RITZ ROYALE, and RITZ CLASSICS. Shen's RITZ products are found in department stores, houseware stores, bed, bath and linen stores, discount stores, and others. Shen's products have a presence on Fifth Avenue in New York City as well as within the food service industry, trade shows and hotel/motel institutional shows. It is also clear that other

than perhaps a drabble of shower curtains, there is absolutely no evidence of record that RHL has sold any of the goods listed in its application in U.S. commerce under the proposed marks at issue. No survey evidence of connotation was offered by either party.

The Respondent, Ritz Hotel Limited, is a limited corporation under the laws of the United Kingdom and maintains a hotel in Paris, France. Its United States presence is entirely by means of travel publications and other publications discussing a hotel in Paris, France. With the possible exception of some shower curtains in the early 1980's, no goods are sold under RHL's proposed marks of the Oppositions. Applicant RHL now seeks to transplant its alleged fame for a hotel in Paris, France to household goods in the United States and cooking and kitchen related goods and services in the United States. Such goods and services include floor mats and matting, linoleum for covering existing floors, wall coverings made of vinyl and plastic, dinner plates, saucers, household brushes, sponges, steel wool and household glassware, food services including instructions in cooking, and meal preparation for chefs, and shower curtains.

Other than these facts regarding its hotel in Paris, RHL offers nothing by way of facts relating to the products they propose to use in connection with a RITZ mark.

THE TRADEMARK TRIAL AND APPEAL BOARD'S DECISION

Regarding the merits of the Oppositions, the Trademark Trial and Appeal Board focused on two considerations, the similarities of the marks and the similarities of the goods, to undertake its likelihood of confusion analysis. App. 19a. The Board sustained the first two oppositions, both for the typed drawing RITZ for providing courses of instruction in cooking, meal preparation, wine selection (Ser. No. 73/499, 080, Op. No. 72,818) and for threads for use in textiles (Ser. No. 73/549, 463, Op. No. 74,778). App. 20a.

First considering the marks, the Board found that they were essentially identical and, because the marks were identical, contemporaneous use by different parties can lead to the assumption that there is a common source even where the goods and services are not competitively or intrinsically related. App. 19a-20a. The Board went beyond this and found that "certain of Opposer's goods are clearly related to providing courses of instruction in cooking and meal preparation, and threads for use in textiles." The Board even went painstakingly further in developing the rationale supporting the finding. App. 20a. The Board also made a finding, regarding threads for use in textiles, that regardless of how sophisticated the purchaser is, no degree of sophistication would enable even a professional to distinguish between essentially identical marks. *Id.* The Board made no findings other than a conclusion that the purchaser would be sophisticated.

Turning to RHL's Application Ser. No. 73/572,795 (Op. No. 75,003) for THE RITZ KIDS in typed drawing form for goods including gloves, the Board found that a likelihood of confusion existed with Opposer's RITZ and simple diamond design mark. App. 21a. Further articulating its findings, the Board stated that the application at issue included "gloves" of all types and was not limited in any way to specific gloves. App. 21a. The Board next found that a mitt is defined as a type of glove by referring to the dictionary. *Id.* Based on those factual findings the Board found that the marks were legally identical, and the goods were in part legally identical. *Id.* The Board also found that the word THE and the word KIDS were insignificant in contrast to the RITZ term. *Id.*

Turning to Shen's opposition to RHL's applications to register RITZ PARIS and design for dinner plates of porcelain or earthenware, cups, saucers and serving pieces of porcelain, household sponges, household brushes, steel wool, and household glassware (Ser. No. 73/518, 941, Op. No. 73,756), and for rugs, carpets, floor mats and matting, linoleum for

covering existing floors, and wall covering made of vinyl and plastic (Ser. No. 73/518, 946 Op. No. 74,517), the Board noted that the marks were distinctly different in appearance, pronunciation, and especially meaning. App. 22a. The Board found that RHL's mark conjures up a hotel in Paris when considering RHL's proposed goods, household sponges and brushes, even though the Board found that they were factually similar in terms of their functions with Shen's goods. *Id.* The Board made no finding on the meaning or the commercial impression of Opposer Shen's RITZ marks. *Id.*

The Board, turning next to Shen's opposition in RHL's Application Ser. No. 73/514,805 (Op. No. 71,706) for PUTTING ON THE RITZ for shower curtains, noted that Shen's use of shower curtains was subsequent to RHL's alleged use of shower curtains, but Shen had priority for bathroom towels. *Id.* The Board then found, based on its finding that bathroom towels and shower curtains are related goods, that Shen was the senior user. Nevertheless, the Board found no likelihood of confusion. *Id.*

The Board's final consideration was of Shen's opposition to RHL's application for the mark CESAR RITZ (Ser. No. 73/489, 264, Op. No. 72,817) for cooking courses, where the Board found no likelihood of confusion stating that the marks were sufficiently distinct from one another, particularly due to the presence of CESAR as the first term of RHL's mark. App. 23a.

THE FEDERAL CIRCUIT'S DECISION

In a unanimous decision, the Federal Circuit made the following findings. Beginning with Op. No. 71,706 for RHL's PUTTING ON THE RITZ, a mark for shower curtains, the Federal Circuit agreed with the Board's finding that Shen's bathroom towels and RHL's shower curtains are related goods and that the degree of similarity necessary to support a likelihood of confusion concomitantly declines. App. 7a-8a. Regarding the similarity of the marks, the Federal Circuit found that the mark

PUTTING ON THE RITZ, when evaluated as a whole, conveys a strong commercial impression.

> It conjures images of fancy, even swanky, ladies in full length gowns and gentlemen in tails and top hats congregating in a large Art Nouveau restaurant where an orchestra is about to start. This image, one of comfort, sophistication and wealth, resonates strongly with the buying public, leaving them with an impression unlike that from Shen's RITZ mark, which, when used on kitchen textiles, invokes images, if any, of cleaning, cooking or manual labor generally.

App. 8a-9a.

The Federal Circuit came to this conclusion without any factfinding being made by the TTAB on the meaning and commercial impression of Opposer Shen's RITZ marks and by ignoring the dictionary. Also, without any articulation by the Board, the Federal Circuit provided that the two marks also differed in sound and appearance stating that the RITZ mark contains other words in addition to RITZ making both its visual appearance and pronunciation longer. App. 9a. The Federal Circuit then affirmed the Board's decision finding no likelihood of confusion. *Id.*

Turning to Op. Nos. 73,756 and 74,517 for RHL's RITZ PARIS and design, the Federal Circuit affirmed the Board's dismissal of the oppositions. The products that were covered included dinnerware, cups, plates, saucers and drinking glasses, and cleaning items such as steel wool and sponges, and various types of floor coverings including carpets and rugs and vinyl wall coverings. The Federal Circuit provided:

> The crest, ribbon and reference to Paris collectively give the commercial impression of royalty, old-world tradition and continental elegance, which differs from the more mundane impression imparted by Shen's RITZ mark.

App. 10a. This finding was never made by the TTAB and was first made by the Federal Circuit. The Federal Circuit went on to make another factual finding not touched upon by the Board that Shen's mark generally appears as simple block lettering or block lettering centered in a diamond. *Id.* The Federal Circuit went on to affirm the Board's decision stating that Applicant's mark RITZ PARIS and design differed from Opposer's RITZ marks. App. 11a.

The Federal Circuit next turned to Op. No. 72,818 and reversed the Board's decision sustaining that opposition. The opposition related to RHL's application for RITZ for cooking and wine selection classes. The Federal Circuit agreed with the Board's finding that the marks are identical and focused its attention on the relatedness of the goods. App.11a.

The Federal Circuit disagreed with the Board's factual finding that RHL's cooking classes are related to Shen's kitchen textiles. App. 11a-13a. In its analysis, the Federal Circuit provided that the test is not that the goods and services must be related if used together, but merely that such a finding is part of the underlying factual inquiry as to whether the goods and services at issue can be related in the mind of the consuming public as to the origin of the goods. App. 11a. The Federal Circuit went on to state that the relationship between cooking classes and kitchen textiles is more akin to the relationship between restaurant services and beer, where no likelihood of confusion was found, rather than the relationship between snack foods and dog treats, which were found to be related. App. 11a-12a. The Federal Circuit further went on to state that aside from the fact that these goods are used together, there is no indication that the consuming public would perceive them as originating from the same source, and as a result, the Board's finding of relatedness is not supported by substantial evidence. App. 13a. The Federal Circuit provided that since cooking classes and kitchen textiles are not related, the ultimate conclusion as to likelihood of confusion is reversed. *Id.*

Also, notably, the Federal Circuit made a factual finding as to the strength/weakness of Shen's collection of RITZ trademarks, but considered only that Shen's mark RITZ, since it was not famous, was weak. App. 13a, 6a-7a. The Board never considered the strength of Shen's mark whatsoever, other than concluding that Shen's RITZ marks are not famous. App. 6a-7a.

The Federal Circuit turned next to Op. No. 75,003 for THE RITZ KIDS, which was sustained by the Board and reversed by the Federal Circuit. The Federal Circuit stated that it refused to sanction what it perceived as the Board's dissection of RHL's THE RITZ KIDS mark, providing a finding of fact, which was contrary to the Board's finding, that "THE" has elevated significance because of the well-known manner in which people refer to RHL, and also making a finding of fact, which was contrary to the Board's finding, that the term "THE" operates as an indicator of source of RHL's mark, even though it has diminished importance in most other marks. App. 13a-14a.

The Federal Circuit also made a finding of fact that it is unlikely that consumers would mistakenly believe that Shen, a company that actually manufactures products and has sales, has expanded into children's clothing, where RHL, a hotel in Paris which has offered no evidence of sales of goods or services in the United States, is more likely to make children's clothes. App. 14a.

The Federal Circuit went on to make another finding that the pronunciation of THE RITZ KIDS sounds like "the rich kids" leaving the impression of wealth, a concept tied strongly to RHL and not associated in anyway with Shen for its mark. This also was not in any way found by the Board or made of record by the Board. *Id.*

The Federal Circuit also reversed the Board's finding that gloves are related to barbeque mitts as not being supported by substantial evidence. *Id.* The Federal Circuit went on to state

that the mere fact that both barbeque mitts and gloves are worn on the hands simply does not support a finding that consumers would associate these products with a common source. *Id.* Apparently the standard of review has changed. The Federal Circuit summed up this opposition stating that because THE RITZ KIDS is not similar to RITZ and gloves are not related to barbecue mitts, it reversed the Board's decision sustaining Op. No. 75,003. *Id.* It is important to note that there is no evidence of record that Applicant RHL has ever manufactured or marketed any type of gloves. Moreover, RHL chose not to restrict the goods listing to a specific type of glove, and there are no facts of record restricting or narrowing the gloves type. Thus, it can be just as likely that RHL seeks to produce heat resistant gloves under the mark of THE RITZ KIDS.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT FAILED TO FOLLOW EXISTING PRECEDENTS OF THIS COURT, THE FEDERAL CIRCUIT, AND IS IN CONFLICT WITH THE SECOND CIRCUIT ON IMPORTANT ISSUES OF TRADEMARK LAW.

Certiorari should be granted to resolve issues of trademark law regarding the likelihood of confusion analysis, and in particular, (1) evaluation of the similarity of marks, (2) the strength of the marks, (3) a likelihood of reverse confusion, and (4) failure to limit an applicant's goods to the description in its application.

A. The Federal Circuit and TTAB erred in applying the first DuPont factor by failing to consider the commercial impression and connotation of an Opposer's mark RITZ for goods similar or identical to Applicant's goods, where the commercial impression of the mark of Applicant, which is known as " The RITZ", was found to have a commercial impression based on fame derived from the same term.

The Federal Circuit law provides that all relevant facts pertaining to appearance, sound, and connotation must be considered before similarity as to one or more of those factors may be sufficient to support a finding that the marks are similar or dissimilar. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1357, 56 U.S.P.Q.2d 1351, 1354 (Fed Cir. 2000). However, in the present case, the Federal Circuit did precisely what it previously said it may not do, namely not considering facts relating to the connotation and commercial impression of Shen's RITZ mark.

After finding that the parties' goods were essentially the same, i.e. household cleaning products, the TTAB never made a finding on the meaning of Opposer's RITZ mark. While The TTAB determined that the Applicant's RITZ PARIS and design marks conveyed both (1) the meaning of a hotel, and (2) the Applicant's hotel, this is at best only half of what relevant facts are needed when making a comparison of two marks to determine whether the marks have similar meanings. Without all relevant facts (which include the meaning of Opposer's mark), a finding on similarity or dissimilarity cannot be made.

Precedent looks to the meanings of the term, which here is RITZ. The term RITZ has a regular meaning associated with it. The dictionary meaning for "ritzy" was part of the record before the TTAB. The English language meaning of the term is ostentatious or fancy, which was derived from the characteristics of the Applicant's hotel. The ordinary accepted meaning of the

term RITZ, when considering Opposer's RITZ marks, was ignored by both the TTAB and the Federal Circuit. When the meaning of Applicant's mark PUTTING ON THE RITZ was considered, the meaning of RITZ was consistent with the dictionary definition, again a connotation of fancy. However, even if the term RITZ and RITZY are derived from or are characteristic of the Applicant's hotel, the term RITZ when used by Opposer, must also be considered to have a commercial meaning or impression corresponding to the ordinary dictionary meaning. The TTAB applied no meaning at all to Opposer's RITZ mark, and the Federal Circuit applied a meaning that contrasted drastically from the dictionary meaning for the word. The commercial impression of Opposer Shen's mark RITZ, should not be precluded from the ordinary impression of the term. Applicant's mark, however, was given the benefit of the dictionary meaning, since, Applicant "The Ritz Hotel" is that very landmark from which the generic adjective "ritzy", part of the English language, has been derived.

It is untenable to hold that the Applicant's RITZ PARIS design marks bring to mind a hotel in Paris, France whereas Shen's RITZ marks (including the word RITZ alone) do not conjure up the same image. Similarly, it is equally untenable to hold the same for PUTTING ON THE RITZ. Although the Board made no finding of fact regarding the connotation of Shen's RITZ marks, the Federal Circuit attributed a connotation of mundane images of cooking, cleaning and manual labor generally. This unsupported conclusion could not be further from reality. A multitude of dictionary references clearly show that the term "RITZ", standing alone,[1] is commonly understood as *elegant or ostentatious*, and the common idiom associated with "RITZ" is "*put on the Ritz*". Moreover, the dictionary definitions

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[1] Shen's registered mark RITZ of Registration No. 2,288,326 is a trademark not restricted to any special form and has a scope of coverage that extends to all reasonable manners in which the mark could be depicted. Trademark Rule 2.51(e), 37 C.F.R. § 2.51(e); *Phillips Petro v. C.J. Webb*, 442 F.2d 1376, 170 U.S.P.Q. 35 (C.C.P.A. 1971).

of the term "RITZ" (standing alone) directly reference Applicant's hotel as well as its founder, César Ritz. *Id.*

For instance, one dictionary defines RITZ as "Elegant, often ostentatious display." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). Another dictionary defines RITZ as "put on the ritz, *informal* to live in elegance . . . ." RANDOM HOUSE UNABRIDGED DICTIONARY (1997). Yet another dictionary states RITZ as ". . . a name associated with luxury hotels, from the Swiss hotel owner César Ritz (1850-1918). COMPACT OXFORD ENGLISH DICTIONARY (2004); *see also*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1969).

If the "similarity of marks" test is properly applied, there is no way to avoid a finding that the marks at issue are confusingly similar. The similarity in connotation between the marks at issue is resounding.[2] The Federal Circuit was sufficiently convinced that Applicant's proposed marks bring to mind Applicant's hotel, or images of comfort, sophistication and wealth, or royalty, old world tradition and continental elegance. Similarly, adjudicative facts show that the commercial connotation of Shen's mark "RITZ" is commonly understood as referring to the hotel, or something ostentatious and elegant.[3] The similarity in connotation simply cannot be denied.

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[2] Shen's RITZ marks, including RITZ ROYALE and RITZ STERLING, undeniably establish a likelihood of confusion especially in view of the Federal Circuit's attribution to a connotation of royalty as a basis for distinction.

[3] The Board made no finding regarding the connotation/meaning of Shen's RITZ marks. See *infra* Part II for discussion on the Federal Circuit's factfinding in violation of the APA.

B. The TTAB and Federal Circuit erred by failing to consider the connotation and commercial impression of the Opposer's mark RITZ, while inparting a commercial impression for Applicant's RITZ marks based on Applicant's fame for Applicant's Ritz Hotel services.

The Court precedent is clear that the first DuPont factor involves an analysis of similarity of the appearance marks, sound of the marks, and meaning of the marks as well as the commercial impression. The Federal Circuit has considered that the test is satisfied where the Board considers both the meaning and the commercial impression. *Palm Bay Imports, Inc. v. Maison Fondee en 1772*, 396 F.3d 1369, 1371-72 (Fed. Cir. 2005). In the instant case, the TTAB only considered the connotation with respect to the Applicant's RITZ marks (*e.g.*, RITZ PARIS and PUTTING ON THE RITZ) but not Opposer Shen's RITZ marks. The instant case is not unlike *Hewlett-Packard v. Packard Press, Inc.*, 281 F.3d 1261, 1266-67 (Fed. Cir. 2002), where the Federal Circuit determined that the commercial impression was similar, since consumers would be aware of the Applicant's connection with technology – a derivation of a word appearing in the mark at issue. (Compare PACKARD TECHNOLOGIES with HEWLETT PACKARD) In the instant case, neither a meaning nor commercial impression for RITZ, the Opposer's mark, was considered by the TTAB, and the Federal Circuit deemed RITZ to be mundane (though it found "The RITZ" to be renown). Had the meaning and commercial impression of Opposer's mark RITZ been considered, RITZ would have been found to be an ordinary term in the English vernacular having unquestionably the same commercial impression which the TTAB and Federal Circuit deemed Applicant and its marks to possess. To consider the RITZ HOTEL to be so famous, but that when RITZ appears without the word "The" or "Hotel" as it does in Opposer's RITZ mark and one of Applicant's own marks, to not call to mind the famous landmark hotel or its renown fancy character, is clear error.

The first factor therefore, was not properly considered, and the case raises serious questions whether a connotation and commercial impression can be determined to be something other than the term's accepted meaning.

C. The TTAB and Federal Circuit erred by attributing a connotation for the Applicant's mark based on the term containing the Opposer's mark, and not according the connotation or commercial impression for the word RITZ used by Opposer for similar goods consistent with an English dictionary definition.

By failing to perform a complete analysis in determining similarity of the marks, the TTAB and Federal Circuit failed to fully consider the impact of Applicant's fame, which is clear error in view of the precedent established by *Packard Press,* 227 F.3d at 1357. The TTAB considered the connotation of the Applicant's mark to be based on the Applicant's world famous RITZ HOTEL. Applicant attempted to prove its RITZ HOTEL, or THE RITZ as it is also known, has received world-wide fame, and the TTAB acknowledged and considered this. However, consideration of fame for RITZ, cannot stop at the Applicant's mark which was for use with, *inter alia*, household cleaning products, but must also be taken into account when evaluating the commercial impression of the Opposer's RITZ mark and the household cleaning products sold thereunder. The TTAB's failure to consider the commercial impression of Opposer's mark and Federal Circuit's departure from its own precedent, especially here, where there is a dictionary meaning of record for at least the derivation of RITZ, namely "ritzy", is reversible error.

The Federal Circuit in *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1327 (Fed. Cir. 2000), considered that when a famous mark is at issue, it is reversible error not to consider the scope of the goods/services to which fame may be attributed to be broader than the goods/services used with the famous mark. *Id.*

(vacating and remanding the TTAB decision). Similarly, in *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 355 (Fed. Cir. 1992), the Federal Circuit reversed the TTAB and held that had the TTAB conducted a correct assessment of the DuPont factors, which it clearly had not, the *fame of the mark* at issue should have *magnified the significance of the commercial impression similarities* of the respective marks at issue. In the present case, the fame which the TTAB and the Federal Circuit attributed to the Applicant's RITZ HOTEL, impermissibly limited the fame scope, and hence resulted in a misapplication of the first DuPont factor, since fame (of the Applicant or its mark) would be worth consideration. As the Federal Circuit admonished the TTAB for doing in *Kenner*, here, both the TTAB and the Federal Circuit attempted to consider the fame as a distinguishing factor of the Applicant's RITZ marks, when in fact, Applicant's fame for RITZ and Applicant's renown and connection with RITZ, should clearly, as in *Kenner*, have heightened the level of potential similarity between Applicant's mark RITZ and the RITZ marks of Opposer Shen, the senior user, especially where the goods of Applicant and Opposer both included household cleaning products.

D. The Federal Circuit erred by limiting its consideration of the Strength of an Opposer's mark to whether the Opposer's mark was famous.

The legal question of a mark's strength in a likelihood of confusion analysis has competing precedent. The Federal Circuit considers strength to be whether a mark is famous, whereas the Second Circuit considers the primary importance of a mark's strength to be the degree to which a mark is arbitrary, or conversely descriptive, of the goods or services. Under the Federal Circuit law applied in the instant decision below, a mark is a weak mark if it is not a famous mark. Under the Second Circuit law, a mark may be a strong mark without being famous.

The Federal Circuit law improperly equates the strength of a mark with the mark being famous. The Federal Circuit Court

of Appeals determined that Shen's Opposition was based on three (3) of the thirteen (13) DuPont factors, and determined that three (3) of the thirteen (13) DuPont factors under which a likelihood of confusion is considered were relevant in the instant case. Notably, the three factors which the Federal Circuit considered to be at issue were:

(1) the *strength* of the mark;

(2) the similarity of RHL's marks to Shen's RITZ mark; and

(3) the relatedness of the products covered by RHL's applications and those sold by Shen.

App. 3a.

However, when the Federal Circuit considered the relevant factor of strength of the mark, its consideration was limited to whether Shen's mark was famous:

(1) the alleged *fame* of Shen's RITZ mark;

(2) the similarity of the marks; and

(3) the relatedness of the goods.

App. 5a.

Since the Federal Circuit did not consider Shen's RITZ mark to be famous, it then concluded that the Shen RITZ mark was weak (". . . the weakness of Shen's mark lead us to dismiss Opposition No. 72,818"). App. 13a. The determination that Shen's mark was weak, was improper, and led to Shen's mark not being given the weight it should have under the likelihood of confusion analysis.

The Federal Circuit determined that the TTAB's failure to find Shen's mark famous was supported by substantial evidence. However, the Federal Circuit did not consider the strength of Shen's RITZ mark apart from whether the mark was famous.

The result is different when the Second Circuit law is applied. Under the Second Circuit law, Shen's RITZ mark is inherently distinctive as relative to the Shen goods. Shen's strong RITZ mark therefore is entitled to greater protection against the Applicant's mark. The Second Circuit, in considering likelihood of confusion in *Virgin Enters. v. Nawab*, 335 F.3d 141, 147 (2d Cir. 2003), applies a test which considers strength of the mark based on its arbitrary/descriptive character:

> The ***strength of a trademark*** encompasses two different concepts, both of which relate significantly to likelihood of consumer confusion. ***The first and most important is inherent strength, also called "inherent distinctiveness."*** This inquiry distinguishes between, on the one hand, inherently distinctive marks — marks that are arbitrary or fanciful in relation to the products (or services) on which they are used — and, on the other hand, marks that are generic, descriptive or suggestive as to those goods. The former are the strong marks. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976). The second sense of the concept of **strength** of a mark is "acquired distinctiveness," i.e., ***fame***, or the extent to which prominent use of the mark in commerce has resulted in a high degree of consumer recognition. See *TCPIP Holding Co. v. Haar Communications Inc.*, 244 F.3d 88, 100 (2d Cir. 2001) (describing these two concepts of strength); *Streetwise Maps*, 159 F.3d at 743 [(2d Cir. 1998)].

Shen's mark RITZ is arbitrary or in other words, inherently distinctive, as applied to the goods with which Shen uses the mark, as well as the Applicant's goods at issue here. Shen's mark was improperly considered weak by the Federal Circuit, which only concluded that Shen's RITZ mark was not famous. Unquestionably, Shen's mark RITZ would not be a weak mark under this Court's precedent, where the mark RITZ is an arbitrary fanciful term, Shen's sales of over five million dollars annually

of RITZ products, Shen's substantial advertising expenditures, Shen's long-standing use of RITZ for over 100 years, as well as the exposure to millions of customers and potential customers of Shen's RITZ mark annually as they shop in notable stores like Dayton Hudson Department Stores, Federated Department Stores, Bloomingdale's, Macy's, Burdine's, J.C. Penney's, Marshall Field, May Department Stores, Sears, K-Mart, Target, WalMart, and Bed, Bath and Beyond, where the RITZ products (with the RITZ mark in plain view) are on display.

Under the Second Circuit's law, the first and most important consideration of strength of a mark is whether the mark is inherently distinctive, which arbitrary marks like Shen's RITZ mark clearly are. *Id.* and see *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 120 L. Ed. 2d 615, 112 S. Ct. 2753, 23 U.S.P.Q. 2d 1081, 1083 (1992). The Second Circuit also considers fame as the second sense of the strength concept. *Id.* However, unlike the Federal Circuit's law, under the Second Circuit's law, the lack of fame does not render a mark weak. Under the Second Circuit law, Shen's mark, though not famous, is still a strong mark, since it is arbitrary as applied to the goods.

The split between the Circuits has important implications for U.S. Trademark law, under which interstate commerce use is a prerequisite for acquisition of rights. In the Second Circuit, a mark, though not famous, may be strong, whereas in the Federal Circuit, a mark which is not famous, is inherently a weak mark. The partiality given by the Federal Circuit to large companies who have super marks, or who themselves are famous, like the Ritz Hotel Applicant here, places trademark owners, like Shen, who have unique inherently distinctive, arbitrary marks, at a disadvantage because their marks, though having the highest form of distinctiveness, may not be known by everyone everywhere.

Shen has federal trademark registrations for its RITZ marks. App. 47a. TTAB decision. The U.S. trademark statute governing registration of trademarks does not require secondary

meaning to be established unless the mark is merely descriptive. *See* 15 U.S.C. § 1052(e) and (f). In fact, the U.S. Supreme Court, in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 23 U.S.P.Q. 2d 1081, 1083 (1992) clearly discussed and applied the Second Circuit's classic formulation of increasing distinctiveness set forth in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976). The presumption of registration on the Principal Register, therefore, accords distinctiveness to a mark, like Shen's registered RITZ mark here. See 15 U.S.C. § 1057(b); and see *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209 (U.S. 2000). Moreover, in accordance with this Court's authority, the Shen RITZ mark would be inherently distinctive. The presumption of distinctiveness cannot be rebutted by the fact that the mark is not famous. For this to be the law, the Lanham Act would need to be rewritten. Since there is no presumption of fame when a mark is registered, *e.g.*, 15 U.S.C. § 1057(b), it cannot be the law to say that a mark must be a famous to be strong. The law is clear that strength of the mark is a consideration which may be arrived at independent of fame.

Accordingly, a writ from this Court is respectfully requested.

E. Failure to Consider Reverse Confusion in View of Applicant's Fame.

The fame consideration adopted by the TTAB and the Federal Circuit does not follow the DuPont analysis. When the DuPont analysis is considered, the fame to be taken into account under factor five (5) is Opposer's fame, *e.g.*, "the fame of the prior mark", and not the Applicant's fame. However, factor thirteen (13) permits other facts to be considered. Taking into account the fame of the RITZ HOTEL, Applicant's hotel, reverse confusion is unavoidable. In the present case, the TTAB found that, and attributed Applicant to have admitted that, Opposer Shen is a prior user of the mark RITZ. The Federal Circuit has improperly used the consideration of fame to favor a junior user Applicant, instead of recognizing the potential for reverse

confusion. In reverse confusion, the strength of the junior user's mark is crucial in establishing a reverse confusion claim. *Checkpoint Systems, Inc. v. Check Point Software Tech., Inc.*, 269 F.3d 270, 60 U.S.P.Q. 2d 1609 (3d Cir. 2001); *Dreamwerks Production Group v. SKG Studio*, 142 F.2d 1127, n.5, 46 U.S.P.Q 2d. 1561, n.5 (9th Cir. 1998). Given both the Federal Circuit's and TTAB's findings that Applicant's Ritz Hotel in Paris is famous, and one of the most renowned hotels in the world, it is clear that the senior user, Shen, will lose the value of the trademark, its product identity, corporate identity, control over its goodwill and reputation and the ability to move into new markets. *In re Shell Oil Co.*, 992 F 2d 1204, 26 U.S.P.Q. 2d 1687 (Fed. Cir. 1993); *Ameritech, Inc. v. Am. Info. Tech. Corp.*, 811 F.2d 960, 1 U.S.P.Q. 2d 1861 (6th Cir. 1987). Given the overwhelming renowned and defined association of the term RITZ with The Ritz Hotel, a consumer who purchases Shen's RITZ branded products, especially since the marks of both parties are either identical or have identical commercial connotations, is likely to make the association with The Ritz Hotel. There is no reason that Shen's houseware products sold under the mark RITZ, which is identical to or has the identical commercial connotation as RHL's proposed marks, would not be deemed by consumers to originate from The Ritz Hotel, whose proposed marks are for products found by the Federal Circuit and the Board to be related to various Shen RITZ products.

If the Applicant's fame for its Ritz Hotel is permitted to be considered, the fame makes it even more likely that confusion will be clear when consumers are confronted with the term RITZ.

F. The Federal Circuit impermissibly narrowed Applicant's goods description in order to find no likelihood of confusion.

The Federal Circuit diverted from the actual goods description of the application and imposed limitations on the Applicant's goods that are not recognized under the Lanham Act.

The Applicant's goods description in its application for the THE RITZ KIDS is broad enough to cover barbeque mitts. Gloves protect from the cold, and gloves also protect from hot surfaces or items. The Federal Circuit observed that Shen's RITZ glove is a barbeque mitt, not simply a mitt. However, the RHL Applicant's description of gloves and hats is silent, leaving out what the Federal Circuit attributed to the goods description, namely, functioning to keep warm or add style. Here, the Federal Circuit directly contradicted its axiomatic precedent governing a trademark goods description in an application.

> The authority is legion that the question of registrability of an applicant's mark ***must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods***, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

Octocom Sys., Inc. v. Houston Computer Services, Inc., 918 F.2d 937, 942 (Fed. Cir. 1990) (citations omitted) (emphasis added).

Such a construction by the Federal Circuit is not only contrary to its own established precedent, but also opens the door for endless argument and conjecture by future applicants who will claim, without adequately amending the identification of goods, that the "widget" they propose to use in commerce is a different type of widget than that of the prior/senior user.

II. CERTIORARI SHOULD BE GRANTED BECAUSE TTAB ADJUDICATION AND THE REVIEW OF SUCH BY THE FEDERAL CIRCUIT ARE ESSENTIALLY STANDARDLESS, IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

Certiorari should be granted because agency adjudication by the TTAB and agency review by the Federal Circuit do not meet the standards mandated by the Administrative Procedure

Act (APA) in that: (1) the agency failed to provide a reviewable opinion by not providing a concrete factual record, not providing precise legal standards, and not articulating the reasons for its decisions; and (2) the reviewing court, the Federal Circuit, failed to adhere to its restricted scope of review by making factual findings that are independent of the agency record and depriving the agency of the deference afforded by Congress.

A. TTAB's Opaque Decision, Lacking Factfinding, Legal Standards, and Articulate Reasoning

Review of TTAB factfinding can only take place when the agency establishes the record and articulates the reasoning supporting its decision. *Packard Press v. Hewlett-Packard Co.*, 227 F.3d 1352, 1358-60, 56 U.S.P.Q.2d 1351 1354 (citing *Dickson v. Zurko*, 527 U.S. 150, 165, 50 U.S.P.Q.2d 1930, 1937 (1999) (other citations omitted)). Broad brushstroke statements like the statement made by the TTAB —

> We have reviewed these objections, and have considered only that evidence which is relevant and properly before the board.

— are simply inappropriate to allow for judicial review by the Federal Circuit. App. 17a. The TTAB, in other words, is saying the only evidence it considered is the evidence it considered. Accordingly, remand is necessary, at a minimum, to determine what facts the Board considered in making its findings.

The Federal Circuit has recited this rule in remanding the *Packard Press* matter and ordering the TTAB to make the relevant findings. *Packard Press*, 227 F.3d at 1357, 56 U.S.P.Q.2d at 1354 (stating that the TTAB's statement that it [the TTAB] had "considered the marks in their entireties . . . absent further explanation" was simply insufficient for review).

The TTAB failed to definitively set out its rulings on issues as basic as the admissibility of evidence, so to establish the record. Both parties had made a substantial number of objections to the introduction of evidence to the point where separate

appendices were necessary to establish the grounds for such objections — many on the relevance of RHL's press regarding a foreign hotel as well as registrations that were obtained without use in United States commerce. In total the briefs at the TTAB comprised 14 pages of argument and 35 pages of appendices regarding what evidence should be properly before the Board in its deliberations. The extremely limited discussion in the TTAB opinion leaves the parties, and likely the Federal Circuit, uncertain as to what evidence was properly before the Board and what was considered.

For example, Shen had proffered evidence regarding a number of common law variations of its RITZ mark. Those marks included Shen's RITZ STERLING, RITZ ROYALE, RITZ SUPREME, and RITZ CLASSICS, among others. It is utterly impossible to determine from the TTAB's opinion whether this evidence was made part of the record and considered by the Board or the Federal Circuit in their "commercial impression of the mark" analysis. Judicial review cannot take place without some TTAB ruling on this issue.

Due to the TTAB's silence as to what comprised the record, the Federal Circuit made its own factual findings without a clear record set by the TTAB. This *de novo* factfinding is contrary to the mandate of APA Section 706(2)(E).

B. The Reviewing Court / Federal Circuit as the Factfinder.

In reviewing the TTAB's Opinion, the Federal Circuit improperly made many factual findings that were not made by the Board.

> Judicial review under the substantial evidence standard can only take place when the agency explains its decisions with sufficient precision, including the underlying factfindings and the agency's rationale. Only then can this court engage in reasoned review of agency decision making, and thus provide the deference that

> this court must properly give to the PTO's factual determinations.

Packard Press, 227 F.3d at 1357 (citing *Zurko*, 527 U.S. at 165; *In re Gartside*, 203 F.3d 1305, 1315 (Fed. Cir. 2000)).

However, the Federal Circuit disregarded this standard of review by making *ultra vires* factual findings on its own, when the TTAB failed to make required factfinding. For instance, the TTAB made no finding of fact regarding the meaning of Shen's RITZ mark. However, the Federal Circuit exceeded its scope of review by engaging in *ultra vires* factfinding stating that Shen's RITZ mark's meaning was "mundane". App. 10a. Moreover, the Federal Circuit's finding is contrary to established dictionary definitions, which judicial notice thereof should be taken.

It is unclear what standard the TTAB used to compare the marks, or whether the TTAB used any standard whatsoever. As such, it would be impossible for the Federal Circuit to review the TTAB's conclusion under the substantial evidence standard without exceeding the permissible scope of review. The proper approach was remand, but the Federal Circuit pushed on into factfinding territory.

The standard for comparing marks for similarity involves consideration of sight, sound and meaning. 3 J.T. McCarthy, McCarthy on Trademarks and Unfair Competition, § 23.22 (2004). It is not clear from the TTAB opinion what test was used and what facts, other than the few stated, were considered in performing the similarity analysis. As for meaning, the TTAB made no finding as to Shen's marks. Similarity inherently involves comparing two marks, and such analysis was not fully performed by the TTAB since it made no finding as to meaning of Shen's marks. The "psychological imagery evoked by the respective marks" may turn the similarity analysis one way or another. *See, e.g., Vornado, Inc. v. Breuer Elec. Mfg. Co.*, 390 F.2d 724, 156 U.S.P.Q. 340 (C.C.P.A. 1968) (Smith J. dissenting); *Colgate Polmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d 1400, 167 U.S.P.Q. 529 (C.C.P.A. 1970) (relying on

standard dictionary meanings to determine similarity in meanings of the respective marks).

Another example of this error is the Federal Circuit's factual finding that Shen's RITZ mark is weak, where, again, the TTAB made no finding of fact regarding the strength of Shen's RITZ mark. The TTAB neither provided a standard for strength of Shen's mark nor did the TTAB consider the relevant evidence in light of that legal standard. From a judicial review standpoint, it is utterly impossible to review because the legal standard was not established nor were factual findings made. *Packard Press*, 227 F.3d at 1358, 56 U.S.P.Q.2d at 1355 ("In order for correct appellate review to occur under our standard of review, the Board must take care to express clearly both the facts as it finds them and the law that it applies to the facts.").

Although the TTAB found Shen's mark not to be famous, and the Federal Circuit upheld the decision as supported by substantial evidence, the legal standard for fame differs from that of strength, involves different considerations, and involves differing factual findings. Compare *Two Pesos v. Taco Cabana, Inc.*, 505 U.S. 763, 768-75, 120 L. Ed. 2d 615, 112 S. Ct. 2753, 23 U.S.P.Q.2d 1081, 1084 (1992) (the test includes a consideration of the distinctiveness of the mark and placement within the spectrum from generic to arbitrary or fanciful) with *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1370 (Fed. Cir. 2002) ("[F]ame of a mark may be measured indirectly . . . by the volume of sales and advertising expenditures . . . and . . . length of time. . . ."). It does not follow lock step that a mark is weak simply because a mark is not famous. For these reasons the opinion of the Federal Circuit should be reversed, and the consolidated opposition should be remanded to the TTAB for a consideration that includes relevant finding as basic as the strength of the senior user's, Shen's, RITZ marks. Accordingly, a writ of *certiorari* is needed to remedy this important issue for both the parties here and other litigants.

C. Substantial Evidence Requires That The Board's Findings Be Given Substantial Deference by the Federal Circuit.

The TTAB made a reasoned finding of relatedness, on the record, premised on the finding that a consumer attending Applicant's RITZ cooking classes also may encounter Shen's RITZ goods, such as kitchen towels, dish cloths, aprons, barbeque mitts, potholders, napkins, and placemats, which the TTAB found to be complementary to Applicant's cooking classes. App. at 20a. The Federal Circuit, in reversing, provided that it "does not necessarily follow that the consuming public would understand those products to have originated from the same source." App. at 11a. However, the TTAB's decision is supported by substantial evidence since Applicant, the source of the cooking course services, is itself intending to sell to consumers goods that are complementary to its cooking course services. The goods of Applicant's applications clearly show that RHL seeks to sell goods that are complementary to cooking courses, namely, dinner plates, cups, saucers, serving pieces, and household glassware. The Federal Circuit failed to consider this, and therefore failed to afford the agency the deference in the findings that are in fact made and supported with articulate reasoning.

The standard of review permits a finding to stand even though that finding can possibly be second guessed by a reviewing court — so long as the opinion is supported with evidence as a reasonable mind might accept as adequate to support a conclusion. *See, e.g. In re Jolley*, 308 F.3d 1317, 1320 (Fed. Cir. 2002) (we will not find the Board's decision unsupported by substantial evidence simply because the Board chose one conclusion over another plausible alternative); *Boucher v. Apfel*, No. 99-1906, 2000 U.S. App. LEXIS 29895 at *18 (6th Cir. 2000) ("it is not the role of this court to second-guess the ALJ's factual conclusions . . . 'even if there is substantial evidence in the record that would have supported an

opposite conclusion.'") (citations omitted); *B&J Oil & Gas v. FERC*, 353 F.3d 71, 77 (D.C. Cir. 1994) ("Although the substantial evidence standard 'requires more than a scintilla,' it 'can be satisfied by something less than a preponderance of the evidence.'") (citations omitted). The "'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *In Re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000) (quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966)).

CONCLUSION

The Court should grant Petitioner Shen's writ of c*ertiorari* in order to resolve unsettled questions of trademark law involving consideration of fame and strength of a mark where the Federal Circuit and the Second Circuit are divergent on these issues, to remedy the Federal Circuit's failure to follow its own established precedent of limiting a trademark application's goods description to what is stated in the application, and to remedy the Federal Circuit's clear failure to follow the standard of review mandated by the APA.

Respectfully submitted,

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